Supreme Court U.S.
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No. 02-69

IN THE SUPREME COURT
OF THE UNITED STATES

Joseph C. Roell, Petra Garibay, and James Reagan,

Petitioners,

v.

Jon Michael Withrow,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, John Michael Withrow, asks leave to file the accompanying Brief in Opposition and to proceed *in forma pauperis*. Respondent was granted leave to so proceed in both the U.S. District Court for the Southern District of Texas and the U.S. Court of Appeals for the Fifth Circuit in this action. On Saturday, September 7, 2002, respondent mailed an *in forma pauperis* declaration to undersigned counsel, but it has yet to be received. The declaration establishes the above statements and that respondent is unable to afford the cost of printing this brief. Respondent's declaration will be filed as soon as it is received.

Respectfully submitted,

Brian Wolfman

Brian Wolfman
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September 13, 2002

Counsel for Respondent

49pp

No. 02-69

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH C. ROELL, etal — PETITIONER
(~~Your Name~~)

VS.

JON MICHAEL WITHROW RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ Respondent asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[✓] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s): TEXAS STATE COURTS
Brazoria County; 14th Court of Appeals; 1st Court of Appeals; Supreme Court
FED. COURTS: Southern & Eastern Districts; 5th Circuit; Supreme Court

[ ] ~~Petitioner~~ Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

~~Petitioner~~ Respondent's ~~affidavit or~~ declaration in support of this motion is attached hereto.

Jon Michael Withrow
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jon Michael Withrow, am the ~~petitioner~~ respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$ 100.00	$	$ 100.00	$
Alimony	$	$	$	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify): _____	$	$	$	$
Total monthly income:	$ 100.00	$	$ 100.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
MCT (Gene Britton)	savings trust fund	$ 7.00	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☑ Home
Value $9,000.00

☐ Other real estate
Value

☑ Motor Vehicle #1
Year, make & model 95 Toyota truck
Value $200.00
non-operable

☑ Motor Vehicle #2
Year, make & model 95 Yamaha motorcycle
Value $200.00
non-operable

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$ 100.00	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other: _____	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other: _____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify): _____	$	$
Total monthly expenses:	$ 100.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am a Texas State Prisoner and I am not allowed to earn or handle any type of money.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Sept 29, 2002

Jon Michael Whitmore
(Signature)

No. 02-69

IN THE SUPREME COURT
OF THE UNITED STATES

Joseph C. Roell, Petra Garibay, and James Reagan,

Petitioners,

v.

Jon Michael Withrow,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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September 13, 2002

QUESTIONS PRESENTED

1. Was the court of appeals correct in vacating a final judgment entered by the Magistrate Judge on the ground that two defendants did not consent to the referral to the Magistrate Judge prior to issuance of the final judgment, as required by both the Federal Magistrates Act, 28 U.S.C. § 636(c), and the local rules of the district court?

2. If not, is the Federal Magistrates Act unconstitutional insofar as it purports to authorize non-Article III judges to preside at trial and enter final judgments in federal district court proceedings?

Perez-Priego v. Alachua County Clerk of Court,
148 F.3d 1272 (11th Cir. 1998) 20

Rembert v. Apfel,
213 F.3d 1331, 1335 (11th Cir. 2000) 20

STATUTES

28 U.S.C. § 636 1

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28 U.S.C. § 636(c) ..... *passim*

28 U.S.C. § 1291 ..... 21, 22

42 U.S.C. § 1983 1

RULES

Fed. R. Civ. P. 73(b) 2, 13, 14

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Fed. R. Civ. P., Appendix of Forms, Form 34 2

Rule 73.2(c) of the Local Rules for the Northern District of Alabama 16

Chapter V, Rule 6.6.3 of the Local Rules of the United States District Court for the Central District of California 16

Local Rule 72.2(D) of the Local Rules of Practice of the United States District Court for the District of Colorado 16

Rule 4(c)(3) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts 16

Local Rule 73.1(c) of the Local Rules of the United States District Court for

the Eastern District of Michigan 16

Rule 73.1(c) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi 16

Rule 73.1 of the Local Rules for the Western District of Missouri 16

Local Civil Rule 73.1(b) of the United States District Court for the Southern and Eastern District of New York 16

Local Rule 72.1.III(b)(2) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania 16

Appendix B, Rule I(1)(a) of the Local Rules of the United States District Court for the Eastern District of Texas 16

General Order No. 80-5 of the United States District Court for the Southern District of Texas 3, 14

Appendix C, Rule 3(b)(3) of the Local Rules of the United States District Court for the Western District of Texas 16

LEGISLATIVE HISTORY

S. Conf. Rep. No. 96-322 (1979) 13

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jon Michael Withrow, a Texas prison inmate, filed a *pro se* suit under 42 U.S.C. § 1983 against prison doctors and nurses regarding constitutionally inadequate medical care. Withrow consented in writing to referral of his case to a magistrate judge for trial and entry of final judgment. However, two of the four defendants never consented, either orally or in writing. A magistrate judge nonetheless presided at trial and entered final judgment in favor of all defendants. On appeal, the Fifth Circuit *sua sponte* questioned whether the two defendants had consented to the referral to the magistrate judge and remanded the case for that determination. After the lower court held that the two defendants had not consented to the referral, the Fifth Circuit vacated the Magistrate Judge's decision and remanded the case for trial before the district court. As shown below, that ruling was correct and does not present issues of importance meriting review by this Court.

STATEMENT OF THE CASE

1. Statutory and Procedural Background

The Federal Magistrates Act, 28 U.S.C. § 636, permits federal district courts to refer certain non-dispositive matters to federal magistrate judges. *Id.* § 636(b)(1). In addition, the Act states that, "upon the consent of the parties," magistrate judges may preside over trials and enter final judgments. 28 U.S.C. § 636(c). In those cases, magistrate judges assume the role of an Article III judge: They issue final judgments that

are not reviewed or approved by a federal district judge and that can only be appealed to a United States Court of Appeals. Section 636(c) provides:

> (1) Upon the consent of the parties, a full-time United States magistrate or part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.
>
> * * *
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

The mechanism for providing the consent required by section 636(c) is addressed by Federal Rule of Civil Procedure 73(b), which provides:

> Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

The Federal Rules of Civil Procedure also provide a sample form on which the parties express their consent to the exercise of jurisdiction by a United States Magistrate Judge. Fed. R. Civ. P. Appendix of Forms, Form 34.

Like many federal district courts, the United States District Court for the Southern District of Texas has established detailed procedures governing the referral of cases to magistrate judges. At the time that Withrow's case was filed, the procedures for referral to magistrate judges in the Southern District of Texas were governed by General Order No. 80-5.[1] Article III(B) of that order instructed the clerk of the court to notify the parties that they may consent to have a magistrate "conduct any or all proceedings in the case and order the entry of a final judgment." General Order No. 80-5, Art. III § B(1), Resp. App. 7A. That notice was mailed to the plaintiff at the time the action was filed and to the other parties as attachments to copies of the summons and complaint. The General Order provided that a case may only be referred to a magistrate judge if consent is first provided in writing by all the parties. In relevant part, the Order stated:

> 2. Execution of Consent.
>
> The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.
>
> 3. Reference
>
> *After the consent form has been executed and filed*, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. *Once the case has been assigned to a magistrate*, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the clerk of the court to enter a final judgment in the same manner as if a district judge had presided.

Id. (emphasis added).

[1] General Order 80-5 has been replaced by General Order 2001-6, which is substantially similar and also requires that the parties all give consent prior to referral to a magistrate judge.

2. Factual Background

In May of 1995, Withrow fell from his prison bunk and broke his ankle. Withrow was taken to the prison infirmary, where he was given pain medication and an ace bandage. He was returned to the prison population, where he was forced to walk around the prison for food, clothing, and other necessities. Prison doctors did not order x-rays, which confirmed that he had broken his ankle, until three days after his accident.. By the time Withrow was admitted to the hospital, six days after the accident, he was suffering from severe swelling and fracture blisters, which complicated the surgery he needed to repair his ankle and caused him to suffer unnecessary pain. Complaint ¶¶ 17-124 (Docket Entry ("D.E.") 1).

On April 30, 1997, Withrow filed this *pro se* lawsuit charging that Joseph Roell and James Reagan, prison physicians, and Petra Garibay and Danny Knutson, prison nurses, were deliberately indifferent to his medical needs in violation of his Eighth Amendment rights. United States District Judge Hayden Head was assigned the case.

On December 15, 1997, prior to service on defendants, Withrow filed a written consent to have the case referred to a United States Magistrate Judge for trial and entry of final judgment. The district court did not await the consent of defendants as the local rules require. Rather, on December 29, 1997, the court referred the case to Magistrate Judge B. Janice Ellington. Pet. App. 16a-17a. In his Order, Judge Head noted that only plaintiff had consented, and he stated that "all defendants will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition." Pet. App. 21a.

On January 14, 1998, Magistrate Judge Ellington ordered the clerk to issue to defendants Judge Hayden's December 29, 1997 Order along with a summons and a copy of the complaint. Defendants were directed to respond to the complaint and in their response to "include a statement that 'All defendants consent to the jurisdiction of a United States Magistrate Judge' or 'All defendants do not consent to the jurisdiction of a United States Magistrate Judge.'" Order for Service of Process (D.E. 34). Defendant Reagan responded that he consented to referral; the rest of the defendants did not indicate whether or not they consented.[2] Pet. App. 17a.

The issue of consent to the referral also came up at several pre-trial hearings. At an evidentiary hearing on September 9, 1997, an attorney representing the Attorney

[2] Knutson settled and was dismissed from the suit on October 20, 1999.

General of Texas attended, but withheld consent, explaining that she could not do so before conferring with the attorney that would be assigned to the case. Hearing 9/9/1997 (D.E. 17). During a telephone hearing on April 27, 1999, the Magistrate Judge reminded counsel for defendants that "all defendants need to consent before I can hear a case," but the parties did not consent orally or provide written consent. Hearing 4/28/1999 (D.E. 141). Again, on July 21, 1999, the issue of consent was raised, but counsel for defendants Roell and Garibay did not expressly consent to the referral. Hearing 7/21/1999 (D.E. 219).

The trial went forward before a jury. During jury selection, the Magistrate Judge announced that the parties had consented to a trial before a United States Magistrate Judge. Pet. App. 27a. Roell and Garibay neither objected to this statement nor used the occasion to consent to the reference. Pet. App. 18a. After a three-day trial, the jury returned a verdict for defendants. Magistrate Judge Ellington issued final judgment in favor of defendants on May 15, 2000. Withrow then filed a timely notice of appeal.

On November 21, 2000, before any briefs were filed, the Fifth Circuit *sua sponte* remanded the case to the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." App. 13a. The Fifth Circuit retained jurisdiction pending district court compliance with the remand. *Id.*

On remand, defendants Roell and Garibay for the first time filed a written consent, in which they stated that "they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Pet. App. 22a.

The district court referred the issue to Magistrate Judge Ellington for a report and recommendation. Magistrate Judge Ellington noted that all defendants had been directed to file a statement as to whether they consented to the jurisdiction of a magistrate judge at the time they received service of process, but that only defendant Reagan had complied with that order. Pet. App. 17a. Nor had defendants Roell and Garibay given oral consent to the reference in the six hearings that preceded the trial. Pet. App. 17a. The Magistrate Judge concluded that defendants Garibay and Roell had implicitly consented to her jurisdiction but had not expressly consented until after the jury issued its decision and therefore that the case would have to be retried. Pet. App. 19a. The district court adopted the report and recommendation over defendants' objections and the case returned to the Fifth Circuit. Pet. App. 14a.

In his appellate brief, Withrow argued that the Magistrates Act requires pre-judgment consent, and thus Magistrate Judge Ellington had no authority to enter a final judgment and the Fifth Circuit had no authority to review that final judgment. Withrow also expressed his concern that petitioners had engaged in gamesmanship, noting that although the issue of whether the parties had consented was raised on numerous

occasions, petitioners' counsel had carefully avoided either granting or withholding consent on behalf of his clients. Withrow's Appellate Brief at 5-7. Withrow argued that "the Defendants delayed consenting so that if they lost at trial a claim of lack of jurisdiction could be raised." *Id.* at 5.

Petitioners acknowledged that whether the parties consented to the Magistrate Judge is a jurisdictional question subject to *de novo* review. Petitioners' Appellate Brief at 2. According to petitioners, "[a]lthough no written or oral consent to trial by [the] Magistrate appears in the record prior to the time of trial, Roell and Garibay did consent to the Magistrate's jurisdiction, as demonstrated by the actions of the lower court and all parties." *Id.* at 1. Petitioners noted that the Magistrate Judge had discussed the need for all parties to consent at several hearings, and on a few occasions appeared to believe that petitioners had already consented, but petitioners admitted that they had never given explicit consent. *Id.* at 1-3. Petitioners urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures jurisdictional defects." *Id.* at 4.

The Fifth Circuit held that defendants had not consented to the referral prior to the trial, as required by the Magistrates Act. The court rejected Roell and Garibay's argument that their post-judgment consent was sufficient, noting that the plain language of the Act makes consent a "condition precedent" to the magistrate judge's exercise of jurisdiction and that the legislative history supports this interpretation. Pet. App. 8a. The

court commented that the rule urged by petitioners would lead to gamesmanship: Parties would be tempted to withhold consent, await the outcome of trial, and then consent only if they prevailed. In this very case, the court noted, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Pet. App. 10a. In addition, the Fifth Circuit explained that permitting post-judgment consent requires inferring from a party's post-judgment statement that they had given pre-judgment consent, which contradicts Fifth Circuit precedent that consent must be explicit, not inferred from the parties' actions. Pet. App. 9a-10a. Finding that defendants' lack of consent was a jurisdictional error that could not be waived, the Fifth Circuit remanded the case for retrial. Pet. App. 10a.

REASONS FOR DENYING THE WRIT

Petitioners seek review by this Court of the question whether the Magistrates Act permits post-judgment consent to referral to a magistrate judge. That question is not clearly presented in this case, however, for several reasons. First, essential to petitioners' argument is their claim that their written post-judgment consent simply "confirmed" the implied consent evident from their pre-judgment conduct. However, petitioners failed to consent prior to judgment, either in writing or orally, despite repeatedly being informed by the court that they must do so — behavior that suggests that petitioners were withholding consent, not granting it, undermining petitioners' claim of implied consent. Thus, the key factual predicate for the question presented, as framed by petitioners, is

missing. Second, petitioners overlook the fact that the local rules in the Southern District of Texas *require* pre-judgment consent, which provides an alternative basis for the Fifth Circuit's holding. Moreover, the question whether the Federal Magistrates Act permits post-judgment consent is not significant because many district courts have rules requiring pre-judgment consent, which are indisputably permitted by the Act. In any event, the Fifth Circuit's conclusion that the Act requires consent prior to judgment is correct. Finally, the court's holding that failure to consent is an unwaivable jurisdictional error is both correct and in line with decisions of every circuit court to have addressed this issue.

I. THE FACTS OF THIS CASE PREVENT THIS COURT FROM ADDRESSING THE QUESTION WHETHER THE MAGISTRATES ACT REQUIRES PRE-JUDGMENT CONSENT.

The petition glosses over facts that prevent this Court from addressing the question presented. Petitioners contend that their post-judgment consent merely confirmed their implicit pre-judgment consent, a point that is essential to their argument that the Magistrates Act permits explicit post-judgment ratification of implicit pre-judgment consent. Indeed, Petitioners' question presented asks whether they can their failure to consent by expressly "confirming" their consent post-judgment. Pet. i. Yet, as Withrow argued before the Fifth Circuit, the record reveals that petitioners studiously did *not* consent to the jurisdiction of the magistrate prior to the entry of judgment in their favor, implicitly or otherwise, despite prompting by the Magistrate Judge on numerous occasions, which suggests that they were withholding consent, not granting it.

Petitioners "agree that a magistrate judge cannot act under § 636(c) without the parties' consent," Pet. 15, but argue that the consent need not be made explicitly before judgment as long as the parties' pre-judgment conduct indicates their consent. Petitioners assert:

> Congress' concerns about voluntariness are satisfied in this case by all parties' express consent -- whether pre-trial or post-judgment -- *coupled with indicia of consent from their litigating this case in a manner consistent with consensual referral.*

Pet. 18 (emphasis added). According to petitioners, their post-judgment consent was entirely consistent with their pre-judgment conduct and simply "confirmed" their pre-judgment "indicia of consent." Pet. 1 (describing their written consent as a "post-judgment *confirmation* of consent") (emphasis added); Pet. 6, 14, 15 (same). And in their post-judgment statement submitted to the district court on remand, petitioners declared that they had, in fact, consented all along to the Magistrate Judge's jurisdiction:

> Defendants Roell, Garibay and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Cristi Division for all purposes, including entry of judgment and jury trial. *Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial.*

Pet. App. 22a (emphasis added).

Petitioners' post-hoc assertions that they had consented all along are at odds with their pre-judgment conduct. Petitioners did not submit the consent forms attached to service of process and did not consent, even orally, at the two hearings where this issue

was raised by the Magistrate Judge. *See supra* at 5-6 . Their failure to take advantage of these numerous opportunities to give explicit consent implies an intention to *withhold* consent, not to grant it. On the particular facts here, it cannot be shown (and it is certainly not undisputed) that the parties' conduct was consistent with consent, a point essential to petitioners' claim that the Magistrates Act permits post-judgment consent when that consent "confirms" pre-judgment "indicia of consent." Pet. 18. Thus, this Court has no basis for reaching the question presented.

II. THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS, WHICH REQUIRE THAT ALL THE PARTIES PROVIDE PRE-JUDGMENT CONSENT TO A REFERRAL TO A MAGISTRATE JUDGE, PROVIDE AN ALTERNATIVE BASIS FOR THE FIFTH CIRCUIT'S HOLDING, AND THE EXISTENCE OF SIMILAR LOCAL RULES IN OTHER JURISDICTIONS DIMINISHES THE IMPORTANCE OF THE QUESTION PRESENTED.

A. This case does not squarely present the question of when parties must consent to referral to a magistrate judge under the Magistrates Act because the local rules in the Southern District of Texas provide an alternative ground for sustaining the Fifth Circuit's decision.

Petitioners argue that Congress, in enacting the Magistrates Act, "insisted only that consent be voluntary, not that parties manifest consent in a particular manner." Pet. 6. Even if that statement were correct, the local rules of the Southern District of Texas mandate that parties provide written consent *before* a case can be heard and decided by a magistrate. Accordingly, the result in this case does not turn solely on the requirements of the Magistrates Act.

District courts are free to enact local rules of procedure as long as those rules are "consistent with" federal statutes and the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a)(1). Even if the Magistrates Act does not require express pre-judgment consent, as we believe it does, it certainly does not bar district courts from establishing local rules mandating pre-judgment consent. To the contrary, requiring pre-judgment consent promotes the Act's goal of protecting the "voluntariness, knowingness, and willingness of the consent" to referral, *see* S. Conf. Rep. No. 96-322, at 7-8 (1979), which is presumably why the Southern District of Texas has adopted such a rule.

Moreover, both the Magistrates Act and Federal Rule of Civil Procedure 73(b) expressly contemplate that district courts will establish procedural rules governing the use of magistrates, including the timing of consent to referrals. Section 636(c)(2) of the Act states: "*Rules of court* for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." (emphasis added). Federal Rule of Civil Procedure 73(b), in turn, confirms that local rules govern the time period within which the parties must express their consent to the referral: "If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election." (emphasis added). The advisory committee notes explain that "flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within

which an election must be made." Advisory Committee Note to Fed. R. Civ. P. 73(b). Thus, even if 28 U.S.C. § 636(c) does not require explicit, pre-judgment consent, the Magistrates Act grants the Southern District of Texas the authority to impose a reasonable deadline by which the parties must consent.

And it has done so. The local rules of the Southern District of Texas require that parties consent prior to the magistrate's exercise of jurisdiction. As explained above, *see supra* 3-4, General Order 80-5 states that it is only "*[a]fter the consent form has been executed and filed,*" that the clerk "shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate." Resp. App. 1a (emphasis added). Thus, in the Southern District of Texas the consent form must *first* be executed by all parties, and only thereafter can the case be referred to a magistrate.

Petitioners did not follow the local rules' mandate that they provide written consent prior to referral. Although petitioners received the requisite notice and form regarding referral to the Magistrate Judge as part of service of process, they failed to fill out and return that form. And although the Magistrate Judge mentioned during several hearings that the parties must consent to the referral, petitioners never did so. *See supra* at 5-6. In short, despite multiple opportunities, petitioners did not comply with the district court's rules regarding referrals to magistrate judges.

Petitioners' violation of the local requirements is an alternative ground for concluding that the Magistrate Judge lacked jurisdiction to preside over this case, and

thus the outcome of this case does not turn on the question presented for this Court's review. Although the question whether the local rules mandate pre-judgment consent was not raised before the Fifth Circuit, it is preserved in the record below. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (respondent "may rely upon any matter appearing in the record in support of the judgment below."). If this Court grants the petition for writ of certiorari, respondent will raise the local rules as an alternative basis for the ruling below, which, in our view, makes it likely that the Court will not reach the question whether the Magistrates Act requires express, pre-judgment consent.[3]

B. The fact that local rules govern the timing of consent also diminishes the significance of the question presented. In the 23 years that the Magistrates Act has been in effect, only four circuits have taken a position on the question whether 28 U.S.C. § 636(c) tolerates post-judgment consent. The likely reason for the dearth of case law is that the situation here rarely arises. Most district courts have rules requiring explicit, pre-judgment consent, and most magistrates therefore take care to require that each party has

[3] The conclusion that local courts can set rules requiring pre-judgment consent is not in conflict with the Seventh and Eleventh Circuit decisions permitting post-judgment consent. Petitioners are correct that those courts have held that the Magistrates Act *permits* post-judgment consent, but they have not held that the Magistrates Act *requires* courts to accept post-judgment consent. *See, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997). For example, in *King*, the Seventh Circuit concluded that the Magistrates Act "does not require a specific form or time of consent," which suggests that the Seventh Circuit believed that the Act allows each court to set its own rules. *Id.* at 1185. In sum, the precedents of the Seventh and Eleventh Circuits do not bar individual district courts, or circuit courts for that matter, from establishing procedures prohibiting post-judgment consent.

expressed consent *prior* to presiding over a jury trial or issuing a final judgment.[4] Because it is so rare that the ultimate winner at trial failed to consent to the referral, the question whether the Magistrates Act actually permits the winner to consent after the fact rarely arises. In short, to the degree that there is a split of authority in the abstract, as a practical matter the majority of district courts have set local rules that prevent the conflict from arising.

[4] *See, e.g.*, Rule 73.2(c) of the Local Rules of the United States District Court for Northern District of Alabama (if all parties consent within 90 days after a civil case is filed, their consents will be docketed and the case will be reassigned to a magistrate judge); Ch. V, Rule 6.6.3 of the Local Rules of the United States District Court for the Central District of California (parties' written consents must be filed before magistrate judge has authority to conduct proceedings; consent must be filed "at least thirty (30) days prior to date of the Final Pre-trial Conference" unless district court approves later consent); Local Rule 72.2(D) of the Local Rules of Practice of the United States District Court for the District of Colorado (written consent to proceed before a magistrate judge "must be filed no later than ten days after the discovery cut-off date"); Rule 4(c)(3) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts (consent form must be filed with the clerk "within twenty days of the filing of an answer or other responsive pleading by the parties"); Local Rule 73.1(c) of the Local Rules of the United States District Court for the Eastern District of Michigan (consent forms may be entered until 30 days before trial); Rule 73.1(c) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi (requiring that consent be entered "at any time before trial of the case"); Rule 73.1 of the Local Rules for the United States District Court for the Western District of Missouri (clerk shall not accept consent form unless it has been signed by all parties; "[a]fter consent form has been executed and filed" clerk will transmit it to district court judge for referral); Local Civil Rule 73.1(b) of the United States District Court for the Southern and Eastern District of New York (consent forms must be filed before case is assigned to magistrate judge); Local Rule 72.1.III(b)(2) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania; Appendix B, Rule I(1)(a) of the Local Rules of the United States District Court for the Eastern District of Texas (clerk shall not file consent forms until all parties have consented); Appendix C, Rule 3(b)(3) of the Local Rules of the United States District Court for the Western District of Texas ("[a]fter consent form has been executed and filed" clerk will transmit it to judge for referral to magistrate).

In addition, because so many local district rules require pre-judgment consent, a ruling on whether the Magistrates Act also requires pre-judgment consent would have little effect on the conduct of parties in the lower courts. The parties will normally follow the requirements of the local rules and give pre-judgment consent. In those rare cases where the parties do not follow the local rules, and the magistrate judges fail to insist that they consent before entering a final judgment, the courts need not address the question whether the Magistrates Act itself requires pre-judgment consent if, as is usually the case, the local rules contain the same requirement.

III. THE FIFTH CIRCUIT'S HOLDING IS CORRECT.

The Fifth Circuit's reading of section 636(c) is correct. The statute states: "*Upon the consent* of the parties, a . . . United States magistrate [judge] . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." (emphasis added). The language of section 636(c) makes consent a condition precedent for a magistrate's exercise of jurisdiction. The legislative history supports this conclusion. The Senate Report accompanying the 1979 amendments to the Act, in which Congress granted magistrate judges the authority to handle dispositive matters, explained, "[t]he Bill clearly require[d] the voluntary consent of the parties as a *prerequisite* to a magistrate [] [judge's] *exercise* of the new jurisdiction." S. Rep. No. 96-74, at 5 (1979) (emphasis added). Moreover, pre-judgment consent prevents parties from gaming the

system by withholding consent until they know whether they have won or lost, a strategy that parties would surely adopt if they were permitted to consent post-judgment.

Indeed, petitioners' conduct in this case raises the very concerns about gamesmanship that support the Fifth Circuit's reading of the Magistrates Act. Petitioners did not consent pre-judgment, despite repeated prompting by the magistrate judge, and thus at the time of entry of the final judgment they were free either to consent or object to the referral. Fifth Circuit commented that "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Pet. App. 10a. To prevent parties from gaming the system, and to ensure that every party has knowingly and voluntarily consented to the magistrate's jurisdiction, the Federal Magistrates Act and the rules of the Southern District of Texas require explicit, pre-judgment consent.

Moreover, any other reading of the Magistrates Act raises serious constitutional questions about the provisions of the Act that permit magistrates to preside over jury trials and enter final judgments. *See Peretz v. United States*, 501 U.S. 923, 929-30 (1991). Article III of the U.S. Constitution provides that all judges assigned the task of deciding questions of federal law must have life tenure and salary protections -- protections that magistrates lack. Thus, the provisions of the Magistrates Act permitting magistrates to enter final judgments, even *with* all the parties' consent, are constitutionally suspect. *See Peretz*, 501 U.S. at 937 (discussing constitutional concerns raised by transfer of jurisdiction to non-Article III tribunals). Indeed, if this Court grants

review, we will argue that the Magistrates Act does not permit magistrates to preside over jury trials and enter final judgments absent every party's pre-judgment consent, as the Fifth Circuit held, and, alternatively, that the provisions of the Magistrates Act permitting non-Article III magistrates to take on such a role are unconstitutional.

IV. PETITIONERS' FAILURE TO CONSENT BEFORE JUDGMENT DEPRIVED THE FIFTH CIRCUIT OF JURISDICTION OVER THIS APPEAL.

Petitioners argue that, even if the Magistrates Act requires pre-judgment consent, failure to consent does not deprive the appellate court of jurisdiction over the final judgment entered by the Magistrate Judge, and thus the issue of consent should not have been raised *sua sponte* by the Fifth Circuit. Petitioners did not make this argument below -- in fact, they admitted that "[w]hether all parties consented to [the] Magistrate is a jurisdictional question," Pet. Appellate Br. at 2 -- and thus it has been waived. However, even if Petitioners had not waived the issue, and even if Petitioners were correct that the issue of consent does not affect the appellate court's jurisdiction, the Fifth Circuit nonetheless had discretion to raise such a fundamental issue *sua sponte*, without waiting for the parties to raise it themselves, and thus the question whether the issue is "jurisdictional" is irrelevant.

In any case, the Fifth Circuit's conclusion that the question of consent is a jurisdictional question that must be raised *sua sponte* is correct, and is in line with the other circuit courts to have addressed the issue. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001); *Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*,

237 F.3d 1001, 1003-04 (9th Cir. 2001); *American Suzuki Motor Corp. v. Bill Kummer*, 65 F.3d 1381, 1385 (7th Cir. 1995). As these courts have explained, the Magistrates Act provides that a party "may appeal directly to the appropriate United States court of appeals" from a magistrate judge's final judgment "in any case referred under paragraph (1) of this subsection." 28 U.S.C. § 636(c). A magistrate judge may only issue a final judgment in a case referred under paragraph (1) "[u]pon consent of the parties." *Id.* Thus, without consent, a magistrate judge has no authority to enter a final judgment and the court of appeals has no power to hear the appeal from the magistrate judge's purported entry of final judgment. If the consent requirement is not met, a magistrate judge's final judgment has status equivalent to a magistrate judge's report and recommendation, which must be adopted by a district court before it can be appealed. *See, e.g., Rembert v. Apfel*, 213 F.3d 1331, 1335 (11th Cir. 2000) ("[W]e are in essence asked to review a nonfinal, nonappealable report and recommendation not yet adopted by the district court. We cannot pass on the merits of this appeal, but must dismiss it for lack of jurisdiction."); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272, 1273 (11th Cir. 1998).

Petitioners claim that two Tenth Circuit cases have held that errors in the referral process do not vitiate appellate jurisdiction. *See* Pet. 19 (citing *In re Griego*, 64 F.3d 580 (10th Cir. 1995); *Clark v. Poulton*, 963 F.2d 1361 (10th Cir. 1992)). In both cases, however, the magistrate judges did not attempt to enter a final judgment, but instead

issued a report and recommendation that was ultimately adopted by the district court. The Tenth Circuit held that errors in that referral process did not deprive it of jurisdiction over the final judgment because the judgment had been entered by the *district court*, not by the magistrate. *See In re Griego*, 64 F.3d at 583; *Clark*, 963 F.2d at 1366-67. That is the same conclusion that the *en banc* Fifth Circuit reached in *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987), which held that the errors in the referral process did not deprive the court of jurisdiction to review the final judgment entered by the district court. *Id.* at 1135. In this case, however, the Magistrate Judge herself purported to enter final judgment, from which Withrow appealed. Because the Magistrate Judge had no authority to issue that judgment absent the parties' consent, the Fifth Circuit had no jurisdiction over the appeal.

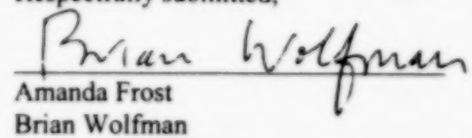
According to petitioners, the Fifth Circuit held that petitioners' failure to consent to the referral deprived it of *subject matter* jurisdiction over Withrow's appeal of the final judgment, which differentiates the Fifth Circuit's decision from those circuit courts that have held they lack *appellate* jurisdiction, 28 U.S.C. § 1291, over a final judgment entered by a magistrate judge without the consent of all the parties. Pet. 18-19 & n.11. Although it is not clear whether the Fifth Circuit's holding was based primarily on lack of Article III subject matter jurisdiction or lack of appellate jurisdiction under section 1291, both are grounds for dismissing the appeal for want of jurisdiction. A federal court can exercise jurisdiction only when it has both constitutional *and* statutory authority to do so.

Because Magistrate Judge Ellington was not properly delegated authority by an Article III judge to issue a final judgment, the Fifth Circuit had no *constitutional* authority to review that judgment. And because the Magistrate Judge lacked authority to enter a final judgment pursuant to the Magistrates Act, the Fifth Circuit lacked *statutory* jurisdiction because there was no final judgment to review, as required by section 1291. Thus, the Fifth Circuit was required to raise the issue *sua sponte* and dismiss the appeal for want of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Counsel for Respondent

September 13, 2002

APPENDIX

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 16 1980
JESSE E. CLARK, CLERK
BY DEPUTY: E. Churchwell

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

IN THE MATTER OF JURISDICTION AND PROCEDURES FOR UNITED STATES MAGISTRATES FOR THE SOUTHERN DISTRICT OF TEXAS	§ § § § § § §	GENERAL ORDER NO. 80-5

ORDER

Pursuant to the Federal Magistrates Act of 1979 and Local Rule 19, it is

ORDERED that the authority of the United States Magistrates for the Southern District of Texas, the assignment of matters to them, the procedures to be followed before the Magistrates, and the review and appeal of magistrate cases shall be in accordance with the provisions set forth in that part of this Order entitled "Practice before United States Magistrates, Southern District of Texas" including the forms attached thereto.

The Clerk will furnish certified copies of this Order to the several divisions of this court and to the Magistrates of this court. Copies will be available in the office of the Clerk.

ORDERED and ADOPTED, this 16th day of June, 1980.

JOHN V. SINGLETON, JR.
Chief Judge

Woodrow Seals
WOODROW SEALS
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By E. Churchwell
Deputy Clerk

CARL O. BUE, JR.
United States District Judge

OWEN D. COX
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

ROSS N. STERLING
United States District Judge

GEORGE E. CIRE
United States District Judge

JAMES DE ANDA
United States District Judge

NORMAN W. BLACK
United States District Judge

GEORGE P. KAZEN
United States District Judge

GABRIELLE K. McDONALD
United States District Judge

HUGH GIBSON
United States District Judge

ALLEN B. HANNAY
Senior United States District Judge

PRACTICE BEFORE UNITED STATES MAGISTRATES
SOUTHERN DISTRICT OF TEXAS

ARTICLE I. AUTHORITY OF UNITED STATES MAGISTRATES

A. Duties Under 28 U.S.C. § 636(a).

Each United States magistrate of this court is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may -

1. Exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

2. Administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

3. Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

B. Disposition of Misdemeanor Cases - 18 U.S.C. § 3401.

A magistrate may -

1. Try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

2. Direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

3. Conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

C. Determination of Non-Dispositive Pretrial Matters - 28 U.S.C. § 636(b)(1)(A).

A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in Subsection D, below.

D. Recommendations Regarding Case-Dispositive Motions - 28 U.S.C. § 636(b)(1)(B).

1. A magistrate may submit to a district judge a report containing proposed findings of fact and recommendations for disposition by the district judge of the following pretrial motions in civil and criminal cases:

(a) Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

(b) Motions for judgment on the pleadings;

(c) Motions for summary judgment;

(d) Motions to dismiss or permit the maintenance of a class action;

(e) Motions to dismiss for failure to state a claim upon which relief may be granted;

(f) Motions to involuntarily dismiss an action;

(g) Motions for review of default judgments;

(h) Motions to dismiss or quash an indictment or information made by a defendant; and

(i) Motions to suppress evidence in a criminal case.

2. A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this subsection.

E. Prisoner Cases Under 28 U.S.C. §§ 2254 and 2255.

A magistrate may perform any or all of the duties imposed upon a district judge by the rules governing proceedings in the United States district courts under § 2254 and § 2255 of title 28, United States Code. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a district judge a report containing proposed findings of fact and recommendations for disposition of the petition by the district judge. Any order disposing of the petition may only be made by a district judge, unless there is consent pursuant to Subsection H of Article I, below.

F. Prisoner Cases Under 42 U.S.C. § 1983.

A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a district judge a report containing proposed findings of fact recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

G. Special Master References.

A magistrate may be designated by a district judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and rule 53 of the Federal Rules of Civil Procedure. Upon the consent of the parties, a magistrate may be designated by a district judge to serve as a special master in any civil case, notwithstanding the limitations of rule 53(b) of the Federal Rules of Civil Procedure.

H. Conduct of Trials and Disposition of Civil Cases Upon Consent of the Parties - 28 U.S.C. § 636(c).

Upon the consent of the parties, a full-time magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings upon consent of the parties, a magistrate may hear and determine any and all pretrial and posttrial motions which are filed by the parties, including case-dispositive motions.

I. Other Duties.

A magistrate is also authorized to -

1. Exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the district judges;

2. Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;

3. Conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;

4. Receive grand jury returns in accordance with rule 6(f) of the Federal Rules of Criminal Procedure;

5. Accept waivers of indictment, pursuant to rule 7(b) of the Federal Rules of Criminal Procedure;

6. Conduct voir dire and select petit juries for the court;

7. Accept petit jury verdicts in civil cases in the absence of a district judge;

8. Conduct necessary proceedings leading to the potential revocation of probation;

9. Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

10. Order the exoneration or forfeiture of bonds;

11. Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

12. Conduct examinations of judgment debtors in accordance with rule 69 of the Federal Rules of Civil Procedure;

13. Conduct proceedings for initial commitment of narcotics addicts under title III of the Narcotic Addict Rehabilitation Act;

14. Perform the functions specified in 18 U.S.C. §§ 4107, 4108 and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein;

15. Perform any additional duty as is not inconsistent with the Constitution and the laws of the United States.

ARTICLE II. ASSIGNMENT OF MATTERS TO MAGISTRATES

A. Criminal Cases.

1. Misdemeanor Cases. All misdemeanor cases shall be assigned, upon the filing of an information, complaint or violation notice, or the return of an indictment, to a magistrate by random selection, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

2. Felony Cases. Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk of court to a magistrate for the conduct of an arraignment and such pretrial conferences or omnibus hearings as are necessary, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with the subsections C and D of Article I, above.

B. Civil Cases.

1. Any district judge may order that any civil case be assigned by the clerk of court to a magistrate for the conduct of conferences, hearings and other proceedings, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Subsection C of Article I, above. Where designated by a district judge, the magistrate may conduct conferences, hearings and other proceedings, and hear the motions and perform the duties set forth in Subsections D through F of Article I, above. Where the parties consent to trial and disposition of a case by a magistrate under Subsection H of Article I, above, such case shall, with the approval of the district judge to whom it was assigned at the time of filing, be reassigned to a magistrate for the conduct of all further proceedings and the entry of judgment.

C. General.

Nothing in these rules shall preclude the court or any district judge from reserving any proceeding for conduct by a district judge, rather than a magistrate. The court, moreover,

may by order modify the method of assigning proceedings to a magistrate as changing conditions may warrant.

ARTICLE III. PROCEDURES BEFORE THE MAGISTRATE

A. In General.

In performing duties for the court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the general procedural rules of this court, and to the requirements specified in any order of reference from a district judge.

B. Special Provisions for the Disposition of Civil Cases by a Magistrate on Consent of the Parties - 28 U.S.C. § 636(c).

1. Notice.

The clerk of court shall notify the parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment. Such notice shall be handed or mailed to the plaintiff or his representative at the time an action is filed and to other parties as attachments to copies of the complaint and summons, when served. Additional notices may be furnished to the parties at later stages of the proceedings, and may be included with pretrial notices and instructions.

2. Execution of Consent.

The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

3. Reference.

After the consent form has been executed and filed, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. Once the case has been assigned to a magistrate, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the clerk of court to enter a final judgment in the same manner as if a district judge had presided.

ARTICLE IV. REVIEW AND APPEAL OF MAGISTRATE CASES

A. Appeal of Non-Dispositive Matters - 28 U.S.C.§ 636(b)(1)(A).

Any party may appeal from a magistrate's order determining a motion or matter under Subsection C of Article I, above, within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a district judge. Such party shall file with the clerk of court, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A district judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The district judge may also reconsider sua sponte any matter determined by a magistrate under this rule.

B. Review of Case-Dispositive Motions and Prisoner Litigation - 28 U.S.C. § 636(b)(1)(B).

Any party may object to a magistrate's proposed findings, recommendations or report under Subsections D, E, and F of Article I, above, within 10 days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A district judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The district judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

C. Special Master Reports - 28 U.S.C. § 636(b)(2).

Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of rule 53(e) of the Federal Rules of Civil Procedure.

D. Appeal from Judgments in Misdemeanor Cases - 18 U.S.C. § 3402.

A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States attorney. The scope of appeal shall

parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).

(d) Memoranda.

The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also serve a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

(e) Disposition of the Appeal by a District Judge.

The district judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The district judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

(f) Appeals from other Orders of a Magistrate.

Appeals from any other decisions and orders of a magistrate not provided for in this Article should be taken as provided by governing statute, rule, or decisional law.

be the same as on an appeal from a judgment of the district court to the court of appeals.

E. Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties - 28 U.S.C. § 636(c).

1. Appeal to the Court of Appeals.

Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority of 28 U.S.C. § 636(c) and subsection H of Article I, above ,an aggrieved party shall appeal directly to the United States court of appeals for this circuit in the same manner as an appeal from any other judgment of this court.

2. Appeal to a District Judge.

(a) Notice of Appeal.

In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate to a district judge, rather than directly to the court of appeals. In such case the appeal shall be taken by filing a notice of appeal with the clerk of court within 10 days after entry of the magistrate's judgment; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate or a district judge may extend the time for filing the notice of appeal for an additional 20 days. Any request for such extension, however, must be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

(b) Service of the Notice of Appeal.

The clerk of court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his last known address.

(c) Record on Appeal.

The record on appeal to a district judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF

A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that the United States Magistrates of this Court, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Copies of appropriate consent forms for this purpose are available from the Clerk of Court.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the Clerk. Only if all the parties to the case consent to the reference to a magistrate will either the judge or magistrate to whom the case has been assigned be informed of your decision.

Your opportunity to have your case disposed of by a magistrate is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a magistrate for dispostion. References will be made in a manner which will avoid assigning only certain types of cases to the magistrates.

At the time of giving consent to trial by a magistrate, a choice must be made between appeal to the Court of Appeals and appeal to a district judge. If appeal is to a district judge, the Court of Appeals may refuse to review the case further.

Jesse E. Clark

Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Plaintiff	)	
VS.	)	Civil Action No.
Defendant	)	

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE - CIVIL CASE

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before a district judge of the Court and consent to have a United States magistrate selected at random conduct any and all further proceedings in the case, including the trial, and order the entry of judgment.

_____	_____
_____	_____
_____	_____
_____	_____

Any appeal shall be taken to the United States Court of Appeals for the Fifth Circuit, in accordance with 28 U.S.C. § 636(c)(3), unless all parties further consent, by signing below, to take any appeal to a judge of the district court, in accordance with 28 U.S.C. § 636(c)(4).

_____	_____
_____	_____
_____	_____
_____	_____

NOTE: RETURN THIS FORM TO THE CLERK OF COURT ONLY IF IT HAS BEEN EXECUTED BY ALL PARTIES TO THE CASE.

_____

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the Clerk of the Court assign the above-captioned matter to a United States magistrate by established procedure for conducting all further proceedings and the entry of final judgment in accordance with § 636(c) and the above consent of the parties.

_____ _____
Date United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

United States of America	§	
VS.	§	Docket No. _____
_____	§	

CONSENT TO PROCEED BEFORE UNITED STATES MAGISTRATE - PETTY OFFENSE (In accordance with 18 U.S.C. § 3401)

The United States Magistrate has fully informed me of my right to counsel and of my right to trial, judgment, and sentencing before a judge of the United States district court. I have also been advised that I do not have a right to trial by jury.

I HEREBY:

(1) Waive my right to trial, judgment, and sentencing before a United States district judge; and

(2) Consent to have the charges against me disposed of before the United States Magistrate including trial, judgment and sentencing.

_____,
Defendant

_____

Date _____

Before _____
United States Magistrate